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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-92

(PREVIOUSLY OCTOBER TERM, 1970, No. 1419)

CALIFORNIA MOTOR TRANSPORT CO., et al., *Petitioners,*

vs.

TRUCKING UNLIMITED, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF

BORIS H. LAKUSTA,
310 Sansome Street,
San Francisco, California 94104,

W. D. BENSON,
1500 Broadway, Suite 1200,
Lubbock, Texas 79413,

Counsel for Petitioners.

GRAHAM & JAMES,
DAVID J. MARCHANT,
ROBERT J. BARTON,
RICHARD A. EASTMAN,
310 Sansome Street,
San Francisco, California 94104,

HELLER, EHRMAN, WHITE & MCAULIFFE,
M. LAURENCE POPOFSKY,
14 Montgomery Street,
San Francisco, California 94104,

JOHN MACDONALD SMITH,
9 Main Street,
San Francisco, California 94107,

W. D. BENSON and DANIEL H. BENSON,
1500 Broadway, Suite 1200,
Lubbock, Texas 79413,

Of Counsel for Petitioners.

Dated November 17, 1971.

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Petitioners California Motor Transport Co., et al., respectfully move for leave to file a supplemental brief for the purpose of presenting new matter significant to the disposition of the case.

It is the recollection of counsel for petitioners that in answer to a question from the Bench a misstatement of law was made. The question posed was whether a hearing must be held in a certificate application proceeding if a protest is lodged by existing carriers before the Califor-

nia PUC or the ICC. It is the recollection of counsel for petitioners that an affirmative answer was given respecting each commission. Since the law is to the contrary, and since a correct answer may have a vital bearing upon the ultimate disposition of the case, and since that issue was not specifically briefed by either party earlier, petitioners respectfully move that they be allowed to file a supplemental brief in the form attached.

Respectfully submitted,

BORIS H. LAKUSTA,
W. D. BENSON,
Counsel for Petitioners.

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DAVID J. MARCHANT,
ROBERT J. BARTON,
RICHARD A. EASTMAN,

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SUPPLEMENTAL BRIEF

I. THE ICC IS NOT REQUIRED TO HOLD A HEARING WHEN EXISTING MOTOR CARRIERS FILE A PROTEST TO AN APLICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

When protest is filed to a motor carrier certificate application there is no legal requirement that a hearing be held. Section 205(e) of the Interstate Commerce Act gives the Commission discretion whether or not to hold a hearing, as indicated by the following words:

". . . notice shall be afforded . . . for the purpose of . . . participating in a hearing, if a hearing is held . . ."

In accordance with this language the ICC has promulgated rules under which it may exercise its discretion and in lieu of hearing allow protestants to make their views known in writing. Rule 45 of the General Rules of Practice, 49 CFR 1100.45.

II. THE CALIFORNIA PUC IS NOT REQUIRED TO HOLD A HEARING WHEN EXISTING HIGHWAY CARRIERS FILE A PROTEST TO AN APPLICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

The pertinent provision of the California Public Utilities Code is Section 1064 which is part of Article 4 and relates expressly to highway carriers. Section 1064 provides so far as pertinent:

". . . the commission may, with or without hearing, issue the certificate as prayed for, or refuse to issue it, or issue it for the partial exercise only of the privilege sought . . ."

This section applies whether protest is filed or not; there is no basis for stating that the filing of a protest removes the discretion lodged in the Commission.* The Commission has in fact denied hearing on occasion despite protest. A protest does not transform the proceeding into a complaint as the term "complaint" is used in the Code.

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*If a hearing *is* held no protest will be considered unless protestant can demonstrate that its contentions will be "reasonably pertinent to the issues". Calif. PUC Rules of Practice and Procedure, Rule 54. To similar effect for the ICC is its Rule 247 (49 C.F.R. §1100.247).

Section 1005 of the California Public Utilities Code upon which respondents' counsel can be expected to rely is not the pertinent section. It does require a hearing when protest is filed, but it applies *only* to the utilities specified in Section 1001. There is no corresponding language in Section 1064, which is the applicable section for highway carriers.

Sections 1701-1709 of the Code relate to requirements *if* a hearing is held. Therefore, cases construing those sections, such as *California Motor Transport Co. v. PUC*, 59 Cal.2d 270 (1963), are not relevant.

Respectfully submitted,
BORIS H. LAKUSTA,
W. D. BENSON,
Counsel for Petitioners.

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